

**CITY COUNCIL MINUTES
OCTOBER 6, 2014, 7:00 PM
PUBLIC SAFETY BUILDING (401 E. THIRD STREET)**

A work session was held at 6:00 p.m. preceding the meeting. Public Works Director Jay Harris introduced a guest who presented information on the Springs Divestiture Update. Silas Olson, of Hiland Water Corporation, spoke and referred to a handout (Exhibit A). Councilor Rierson reported on the turnout for the Great Willamette Cleanup and its activities. He asked the Council to start thinking about the list of street trees and their subsequent impact as an item for future discussion. Mayor Andrews asked who was going to the next Local Government Dinner planned for October 30 in Carlton.

All Councilors, the Mayor, City Manager, City Attorney, Department Heads and the Interim City Recorder were present. No action was taken and no decisions were made.

I. CALL MEETING TO ORDER

Mayor Andrews called the meeting to order at 7:00 p.m.

II. ROLL CALL

Members Present:	Mayor Bob Andrews	Denise Bacon	Mike Corey
	Bart Rierson	Stephen McKinney	Lesley Woodruff
	Ryan Howard		

Staff Present:	Jacque Betz, City Manager	Truman Stone, City Attorney
	Sue Ryan, Interim City Recorder	Jay Harris, Public Works Director
	Steve Olson, Interim Planning and Building Director	

III. PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was performed.

IV. CITY MANAGER'S REPORT

Ms. Jacque Betz, City Manager, said a \$700 request had been received from the Ford Family Foundation Cohort to help finish the FISH Food Bank project. She said their project is designing and renovating the space for the entryway and volunteers. She said there have been other organizations that have requested funds and the previous requests made.

Mayor Andrews said they would take the request up under Council business.

VII. CONSENT CALENDAR

There was discussion on accepting written testimony emailed to the City Recorder earlier in the day from citizen Robert Soppe. One submitted page dealt with his comments made at the September 15, 2014 Council meeting regarding comments made during Public Comment on parking at George Fox University, the agenda template, and the process for submitting written testimony (Exhibit A). A second submitted page dealt with written testimony for the public hearing on Ordinance 2014-2777. A third submitted page dealt with the motion to lift the moratorium on enforcement of the temporary and portable sign provisions.

MOTION: Rierson/Bacon moved to accept Robert Soppe's written testimony and apply it to the corresponding areas of Council business.
Motion carried (7 Yes/0 No)

MOTION: Rierson/Bacon moved to approve the September 15, 2014 City Council meeting minutes to attach the comments of Robert Soppe regarding the minutes, approving content of the 2014-2015 Notice of Funding Availability from the Newberg Affordable Housing Trust Fund.
Motion carried (7 Yes/0 No)

VIII. PUBLIC HEARING

Mayor Andrews opened the hearing on **Ordinance No. 2014-2777, Establishing a Tax on the Sale of Marijuana and Marijuana-Infused Products** in the City of Newberg at 7:10 p.m.

Mayor Andrews called for conflicts of interest or abstentions.

Staff Report: City Attorney Truman Stone delivered his staff report (Exhibit B) said the ordinance had been drafted at Council's direction and be brought back tonight due to the timeframe of the pending ballot measure and the preemption that would occur under that ballot measure. He explained the background on the measure and the approach various cities in Oregon had taken on addressing the issue. He said initially the ordinance had been drafted with an emergency clause but through research he discovered there is a constitutional prohibition in the Oregon Constitution that prohibits the passage of product taxation by emergency passage. He said if the Council were to adopt it with an emergency clause then if the Court were to challenge it the emergency clause would have to be removed. He said if the Council took out the emergency clause this evening it would mean the ordinance would take effect 30 days after the passage of the ordinance.

Councilor McKinney asked where the collected taxes would go. CA Stone said the general fund but the Council could designate a specific place. Mayor Andrews asked should it be done via the ordinance or be done by resolution. CA Stone said it could be done during the budget, which could statutorily limit the use of the money. Mayor Andrews asked if the Council wanted to specify where it should go such as to Public Safety would that be done by ordinance or resolution because to do so during the budget process seemed unpredictable. CA Stone said it could be done by ordinance, which would statutorily limit where the money could go. He said a resolution or other means could direct where the money would go.

Councilor Howard asked if there was a need to segregate the funds in case the court rules at a later date that the funds need to be returned would it be feasible to do so? CA Stone said it is not certain this would be upheld by the courts but if the City does not pass a tax measure prior to the effective date of the ballot measure then the City would be preempted. He said it is possible under the language of Ballot Measure 91 to have a local tax in place before the effective date of the ballot measure. He said it is also possible the tax could be challenged and ruled ineffective by the courts with the legal process taking a significant amount of time. He said within one to three years there could be tax collected by the City and there could be a potential outcome where the funds would have to be repaid. He said it would be a consideration for the Finance Manager, the City Manager and the Council to not spend the revenue until the legal issues are resolved.

Councilor Corey asked if the gross receipts tax is passed before the initiative, it is not clear whether it will be a valid tax? CA Stone said it was somewhat uncertain. Councilor Corey asked about the seller having to pay a

portion of the tax. CA Stone said the ordinance language on administrative expenses was copied from the City's current ordinance on Transient Lodging Tax.

Councilor McKinney asked if it was prudent to not put the funds into the general fund but set the monies aside until the legal issues are resolved ? He said the money should be spent on public safety. CA Stone said that was not a provision for the ordinance, which is merely setting up the taxing scheme and collection mechanism. He said how the money is spent is a separate issue to be determined in the future. He said there is some risk to the City that the money collected may have to be paid back and it is difficult to estimate how much revenue would be collected. He said depending upon the amount the City should have a contingency plan in place for repayment if needed.

Councilor Howard asked about the sales. CA Stone said this ordinance would only tax retail sales. He said some cities have ordinances that tax it at several points. Mayor Andrews asked about Page 15 under the Section of definitions. He asked about clarifying the section.

Councilor Rierson said the idea of having the ordinance is to fund public safety and be preemptive before the passage of Ballot Measure 91. He had a concern about the timeline. CA Stone said if the tax were overturned it would be for a reason other than the timing of the passage of the local ordinance. He said the ballot measure would not be effective until 30 days after its passage. He said the governor had 30 days post election to make official declaration of the ballot measure's passage. He said the bigger issue is that Ballot Measure 91 contains a tax as part of it, he said it would suffer from the same constraints as the City of Newberg that there had to be some time period for implementation.

City Manager Betz said what was before the Council tonight was a chance to capture new revenue for the City. She outlined the process to collect and allocate the tax, which would be in the future as a separate process from tonight's ordinance. Mayor Andrews asked was it correct that the Council can adopt this tonight, come back with a resolution for distribution of the funds and as part of that action or separately designate that the funds be held in a reserve? City Manager Betz said to not do that tonight but to do at a separate time after the election when staff has had time to research what other cities are doing to be consistent in providing Council with the same information. She said it could be done by resolution to dictate how those revenues would be utilized.

Mayor Andrews turned to Page 16 and asked about the passage that the tax is levied on the seller rather than the purchaser. There was discussion on Section 3.40.030 (C) and on the process for payment of the tax. Mayor Andrews said on Page 17 and Page 18 he wanted to know the definition of "good cause". CA Stone said it allows the Finance Director to work with someone if they had difficulty paying the tax. Mayor Andrews asked what the legal framework was for good cause. City Manager Betz said it was the City Manager's purview. CA Stone said the law uses a reasonable person standard for many things.

Mayor Andrews asked about Page 19 – 20 on the section of 20 days being sufficient for collecting the tax. CM Betz said she did not have an issue with what was written in the ordinance. Mayor Andrews asked about Page 21 and the review of the rules and forms by the Finance Director and if it shouldn't be subject to review by the Council. CA Stone said the Council could choose to delegate it to staff or to bring it back to the Council.

Proponents: None

Opponents: None

Undecided: Robert Soppe had submitted written testimony into the record earlier in the day (Exhibit C).

Mayor Andrews closed the hearing at 7:45 p.m.

Deliberations: Mayor Andrews asked CA Stone for his recommendation. CA Stone said he was acting as legal counsel so could not make a recommendation but otherwise to strike the emergency clause and making the ordinance effective November 5, 2014.

MOTION: Rierson /Corey moved to waive the second reading of **Ordinance No. 2014-2777**, Establishing a Tax on the Sale of Marijuana and Marijuana-Infused Products in the city of Newberg with the exception of the emergency clause and read by title only. Motion carried (5 Yes/ 2 No/Abstain [Howard/McKinney])

Councilor Howard said wasn't against the concept but he would be voting against the ordinance. He said it was unlikely the court were going to uphold their ability to tax it. He said it was clear there would be a uniform tax structure across the state and the local governments will get part of the revenue. He said if it went forward there would be considerable administrative cost in administering it and the City would have to return the tax revenue. He said even if it is upheld, the state can change the structure and equalize it. Councilor Howard said it would also be a disincentive to businesses that would want to locate here. Councilor Howard said after 2017 the amount of the local tax the City would receive would relate directly to the number of businesses selling the product based in the City. He said if Newberg had none, they would receive no tax. He said he felt the Council would be taking advantage of a marginalized group by imposing the gross receipts tax. He said the comparisons to the Transient Lodging Tax are inaccurate. He said his perception is there will not be increased need for public safety because of the products' users. He said he doesn't think it's needed, it won't be effective and it would be invalidated by the court anyway and would create additional administrative expenses for the City.

Councilor Corey said he acknowledged Councilor Howard's comments but the unknown factor of how the state was going to address the tax meant the Council should take care of the issue for the City of Newberg. He said the City needs to put a tax on these types of product and it is no different than a sin tax on other products.

Councilor Rierson said he thought this was their chance now to capture revenue for the City. He said there were a lot of unknown factors. He said this was a mechanism to provide the City a way to recover those costs but in the future it may not be needed. He said it could be reduced or eliminated in the future. He said if you don't have the ordinance in place you won't be able to capture that revenue. He said the point on the distribution was a point well taken but he said the Council could have the opportunity to overturn it.

Councilor Howard said he wanted to respond to Councilor Corey. He said there was a well-thought out taxation scheme for marijuana. He said the efforts of the City to come in and do this was subverting the will of the people for the ballot measure.

Mayor Andrews said he was going to vote for it. He said if the City was going to make a preemptive strike they needed to do it now. He said they could back away from it in the future if that was what was appropriate. He said a growing number of cities is passing this type of ordinance and they were looking at the same struggles that Newberg was dealing with. He asked about the number of cities planning to pass the ordinance. CA Stone said he did not know the exact number but there were a lot of cities that were considering it including several other municipalities were doing it this evening and may potentially be addressing it in November prior to the ballot measure's effective date. Mayor Andrews said if there is a greater number of local entities it would put pressure on the Legislature to address the issue. CM Betz said there were many considering it and unifying behind the idea because they do not want to miss out on the potential for revenue. Mayor Andrews said it was presumptive to also think the Ballot Measure may pass due to recent polls and the current governor and his opponent are both opposed to it. He said if it doesn't pass the ordinance will be moot but otherwise they are prepared by having it in place to collect the tax.

Following the motion, CA Stone read the ordinance by title including the amendment and the change in the effective date to November 5, 2014 due to the removal of the emergency clause.

MOTION: Rierson /Corey moved to adopt **Ordinance No. 2014-2777**, Establishing a Tax on the Sale of Marijuana and Marijuana-Infused Products in the city of Newberg with the exception of the emergency clause and to be read by title only. Motion carried (3 Yes/ 2 No/1 Abstain [Howard/Bacon]/[McKinney])

X. NEW BUSINESS

CA Stone said Council had indicated they wished to lift the moratorium on the enforcement of temporary and portable signs. He said this recommendation included affirming Council's previous commitment to compliance through education and enforcement when necessary.

Councilor Howard said he had planned to abstain because he is running for elected office and asked whether he could vote. CA Stone said it was a decision that was up to him. Mayor Andrews said there are three Council members with election signs posted. He said the issue was temporary and portable signs. There was a discussion on election signs and temporary or portable signs.

Councilor Rierson said they have handed the issue off to their Planning Commission and not allowed them to conclude their work. He said he planned to vote against the motion. Councilor Corey said his understanding was it dealt with the number of signs and not size of signs. He said he was inclined to vote for the motion.

CA Stone said it would include all aspects of regulation under the current Code. Councilor McKinney said it precludes talking about umbrellas because it was not part of the previous work. IBPD Olson said the Planning Commission will take the issue up on November 13.

MOTION: Rierson/Corey moved to lift the moratorium on enforcement of the temporary and portable sign provisions of the Newberg Development Code and instruct City Staff to resume enforcement. Motion carried (5 Yes/2 No [McKinney/Woodruff])

XI. COUNCIL BUSINESS

There was discussion on funding the request for the Ford Family Foundation cohort request and the potential impact on the budget and future requests. There was discussion on the use of the business/enterprise funds for this request. There was discussion on the budget cuts that took place earlier in the year due to constraints. CM Betz said the business license item was chosen because it goes into the business/redevelopment project fund and it was felt the FISH project could get pulled from that. She said it could be pulled from another fund but it was important to remember there isn't extra money anywhere.

MOTION: Rierson/McKinney moved to approve a \$700 donation to the Ford Family Foundation Project from an area selected by the City Manager. Motion carried (7 Yes/ 0 No)

XII. EXECUTIVE SESSION

Executive session pursuant to ORS 192.660(2)(e) Real Property Transactions and (h) Rights and Duties regarding litigation to be filed. The Council entered executive session at 8:40 p.m. The Council exited the first executive session at 9:32 p.m.


The Council entered executive session pursuant to ORS 285C.145 (4) regarding an Enterprise Zone Application at 9:35 p.m. The Council exited the second executive session at 9:56 p.m.

The Council entered open session at 9:57 p.m.

XI. ADJOURNMENT


The meeting adjourned at 9:57 p.m.

ADOPTED by the Newberg City Council this 20th day of October, 2014.



Sue Ryan, City Recorder

ATTEST by the Mayor this 22nd day of October, 2014.



Bob Andrews, Mayor

Please accept the following as written testimony for the Consent Calendar. I regret that I have another commitment and will be unable to attend the meeting.

I would first like to thank the Council for the changes made to rectify the problem of the written material deadline preceding the publication of the Agenda. I would remind the Council that the option to not accept written testimony at the Council meeting was instigated a number of years ago out of concern for a potential problem. The concern was that anyone could effectively postpone a decision by presenting the Council with written testimony that is too long to be practically read at the Council meeting. As I understand it, if the Council accepts anything as testimony, it is obligated to give it consideration. Common sense would lead one to conclude that this requires the Council to read what is accepted as testimony. I would suggest that the Council consider whether or not the new policy regarding written testimony is appropriate in light of this concern.

The Consent Calendar includes the September 15, 2014 meeting minutes for your approval. I spoke during the Public Testimony portion of the meeting and request that the summary of my comments be changed as it is far from accurate.

The proposed minutes state that I "... had concerns over the amount of parking being inadequate...". As I stated clearly in my testimony (which has also been proved electronically), I was explicitly NOT taking a position on whether the amount of parking was appropriate. My concerns were specifically about the approval process, the failure to follow the NDC, and the large discrepancy between the number of attendees for which parking standards applied (2,090) and the actual number of attendees (3,659).

The minutes also state that I "... said on there was inaccurate information about submitting written testimony". I made no claims that anything was "inaccurate" in this regard, just that it was not workable.

City Council Meeting
Date: October 6, 2014
Re: Written Testimony
Topic: Consent Calendar

Submitted by Robert Soppe
via e-mail at 3:43 p.m. 10/6/14
SR

Exhibit A 10-06-14 Minutes

REQUEST FOR COUNCIL ACTION

DATE ACTION REQUESTED: October 6, 2014

Order ____ Ordinance XX Resolution ____ Motion ____ Information ____
 No. No. 2014-2777 No.

SUBJECT: An Ordinance Establishing a Tax on the Sale of Marijuana and Marijuana-Infused Products in the city of Newberg.

Contact Person (Preparer) for this
 Motion: Truman A. Stone, City Attorney
 Dept.: City Attorney's Office
 File No.:

HEARING TYPE: ☒ LEGISLATIVE ☐ QUASI-JUDICIAL ☐ NOT APPLICABLE

RECOMMENDATION:

This Ordinance was prepared by the City Attorney at the request of the Council.

EXECUTIVE SUMMARY:

This ordinance and summary is taken largely from the City of Central Point, the assistance of which is acknowledged and appreciated.

November's general election will include Oregon Ballot Measure 91 (officially known as the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act). Section #42 of this ballot measure is specifically aimed at limiting local government's ability to offset public safety-related impacts/costs by collecting a product tax on marijuana-based products. Section #42's language is as follows:

No county or city of this state shall impose any fee or tax, including occupation taxes, privilege taxes and inspection fees, in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items.

Because this language does not specifically repeal a local marijuana tax in effect at the time of the measure's passage, and because this language can be interpreted to read "No county or city of this state shall [after the effective date of this measure] impose any fee or tax..." it can be argued that this initiative's language would not pre-empt a taxation ordinance if it is adopted by the City Council prior to November's election. City Council adoption does not guarantee that this product tax would not be legally challenged; however, absent invalidation by a state court, this product tax ordinance would survive voter approval of ballot initiative #53, and not adopting the ordinance prior to November, should the initiative pass, would certainly preclude future action on this matter.

The ordinance presented for Council consideration is a gross receipts tax on the sale of marijuana, medical marijuana and marijuana-infused products. A gross receipts tax is applied to the total gross taxable revenues of a business. It is similar to a sales tax except that it is levied on the seller rather than the purchaser. The seller is responsible for maintaining accurate records of its gross revenues from taxable goods and services and then remitting a percentage to the taxing entity. Many businesses that are subject to a gross receipts tax will show the tax on the bill of sale they present to the customer, but it is still the business that is responsible for paying it. Newberg's transient lodging tax is a gross receipts tax. A gross receipts tax has the administrative advantages of ease of collection and ease of auditing.

The proposed ordinance relies heavily on the ordinance adopted by the City of Central Point. The Central Point ordinance was based on those adopted by several Colorado cities and the City of Ashland.

Separate tax rates are set for medical (5%) and recreational (10%) marijuana. These rates mirror those that seem to be most commonly adopted by other cities in Oregon. A common concern expressed is that imposing too great of a tax on regulated marijuana would create greater demand in the black market. Adopting a tax in line with other cities would be less open to opposition than a tax outside of the common range.

This Ordinance contains an emergency clause and would be effective upon passage.

FISCAL IMPACT:

The ordinance allows the seller to retain five percent (5%) of all taxes due to defray the costs of bookkeeping and remittance. It is uncertain what amounts could be expected from this tax.

STRATEGIC ASSESSMENT (RELATE TO COUNCIL GOALS):

The Council asked the City Attorney to draft an ordinance for the taxation of the sale of marijuana for Council consideration.

Please accept the following as written testimony for the hearing on Ordinance 2014-2777.

I am explicitly not taking a position on whether or not it is appropriate to establish a tax of this sort. Rather, I would encourage the Council to not pass this Ordinance as its use would be contrary to the will of the citizenry. As clearly stated in the ordinance, the reason for the timing of this Ordinance is that it will not be legal to impose such a tax if the voters pass Ballot Measure 91. Unless an argument can be made that residents of Newberg are against such a measure even if it passes statewide, then this Ordinance is explicitly designed to be counter to the will of the citizens of Newberg. I have objected before to Council actions of this sort and will continue to do so, without regard to whether or not I personally favor the action itself. I would urge the Council to respect the will of its constituents and to not pass this Ordinance.

I would also ask that the Council give careful consideration to the language of the Ballot Measure that the Council is trying to circumvent. The key phrase here is "impose any fee or tax". If one uses the word "impose" in the sense of how it is generally treated in the English language, the tax is "imposed" both when it is created and every time it is applied. If this interpretation is correct, then Ballot Measure 91, if passed, would negate this Ordinance for any transactions occurring after the Measure passes. I will certainly defer to the City Attorney for the legal meaning of the word "impose" in this situation.

City Council Meeting
Date: October 6, 2014
Re: Public hearing
Topic: Ordinance 2014-2777
Submitted by Robert Soppe
via e-mail at 3:43pm, 10/6/14
SR

Exhibit C 10-06-14 Minutes